Supreme Court of the United States

OCTOBER TERM, 1960

No. 3

MISSISSIPPI VALLEY ELECTRIC COMPANY, A PARTNERSHIP, and FRANK L. PENDERGRASS, JAMES L. PENDERGRASS and KATIE T. PENDERGRASS, INDIVIDUALLY,

Petitioners,

versus

LOCAL 130 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

CONRAD MEYER, III
BALDWIN, HASELL, MOLONY, RAINOLD and MEYER,
[illegible]

LAURENCE J. MOLONY

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Petitioners, Mississippi Valley Electric Company, et al, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit dated December 30, 1960, wherein a rehearing was denied January 27, 1961.

I.

CITATION TO OPINION BELOW

The original opinion of the United States Court of Appeals for the Fifth Circuit is reported in 278 F. 2d 764. On rehearing, with a *per curiam* opinion, the Court reversed itself, which *per curiam* is reported in 285 F.

2d 229. Both the original decision and the *per curiam* are printed in Appendix A hereto, *infra*, pages 53 and 66, respectively.

II.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered a judgment on rehearing in this matter on December 30, 1960, reversing, remanding and setting aside its original judgment in this matter heretofore entered on May 10, 1960.

Petition for rehearing by petitioners was denied on January 27, 1961.

The jurisdiction of this Court to review this case on certiorari is invoked under 28 U.S. Code, Section 1254(1).

III.

THE QUESTIONS PRESENTED FOR REVIEW

(1) Whether the Supreme Court has reversed itself and overruled the rule of law announced in *Association of Westinghouse Salaried Employees vs. Westinghouse Electric Corporation*, 348 U.S. 437 (1955), to the effect that the federal courts have no jurisdiction over actions in which a union seeks to enforce the uniquely personal rights of individual employees.

(2) Whether the principles announced by this Court in its several decisions on arbitration under collective bargaining agreements apply the term "arbitration" to an award made by a group wholly composed of interested, partial members.

(3) Whether federal courts, in a suit brought under Section 301 of the Labor Management Relations Act,

should enforce an arbitration award that is plainly contrary to the specific terms of the collective bargaining contract.

(4) Whether a court of appeals should affirm a summary judgment when the written opinion of the district court exhibits an erroneous appreciation of vital pleaded facts.

(5) Whether a court of appeals departs from sound judicial practice when it reverses its own prior holding of "no jurisdiction" without a rehearing under the impact of new holdings of the Supreme Court and renders judgment on the whole case without any treatment of the issues in the case except jurisdiction.

IV.

STATUTES INVOLVED

The statutes involved are:

(1) 29 U.S. Code, Sec. 185 (Section 301 of the Labor Management Relations Act of 1947.)

(2) Rule 56 of the Federal Rules of Civil Procedure, 28 U.S. Code.

The pertinent sections of these statutes are printed in Appendix B, *infra*, pages 69 and 70.

V.

STATEMENT OF THE CASE

This is a suit by a labor union, respondent, to collect wages in the sum of $350.00 found by a committee to be due to petitioners' employees.

The Parties

The respondent union (herein referred to as "the Union") representing employees engaged in electrical

trades, is a party to a collective bargaining agreement[1] with two employer associations composed of electrical contractors in the New Orleans area. Petitioners, a partnership (hereinafter referred to as "the employer"), are electrical contractors and, as a partnership, is an employer member of one of the aforementioned employer associations, the National Electrical Contractors' Association.

The Agreement

The collective bargaining agreement, in addition to a general wage scale for "minimum wages,"[2] provides three different wage scales for employees engaged in electrical work at various physical locations, namely, (1) "Line Work on Building Trades Job Site,"[3] (hereinafter referred to as "construction wages" or "job site wages"), (2) "Ship Repair Supplemental Agreement,"[4] and (3) "Motor Repair and Armature Rewinding Supplemental Agreement,"[5] (hereinafter referred to as "shop wages").

The collective bargaining agreement contained provisions for the handling of disputes and grievances, the exact wording of which is determinative of several issues raised herein, as is therefore reproduced verbatim in Appendix C, *infra*, page 71.

The agreement contained a "no strike clause," but also gave the union the right to cancel the entire agreement upon a unilateral finding by the union that its unpublished "working rules" had been violated, and for various other reasons.[6]

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[1] Exhibit I.
[2] Article III, Sec. 4, page 11 of Exhibit I.
[3] Article III, Sec. 4-A, page 12 of Exhibit I.
[4] Article IV, Sec. 1, page 24 of Exhibit I.
[5] Article IV, page 30 of Exhibit I.
[6] The "no strike clause" appears in the agreement at Article I, Sec. 4, page 4, of Exhibit I; the right of the union to cancel the entire agreement at will appears at Article II, Sec. 13, pages 9 and 10 of Exhibit I.

The Wage Claim

In December of 1958, the employer was performing a contract to erect certain outdoor lighting facilities in New Orleans.[7] Certain union employees of the employer were engaged within the four walls of the employer's main place of business, its electrical repair and construction shop, in the fabrication of metal supports ultimately destined to become a part of the outdoor lighting construction job mentioned above. These employees, working indoors, were paid the customary "shop rates" called for under the third wage schedule referred to above, as set out in Article IV of the collective bargaining agreement at page 30.[8]

The union charged that the employer should have paid the employees who fabricated the metal supports in the employer's shop at the wage scale for "Line Work on Building Trades Job Site," or, in other words, "construction rates," rather than at the "shop" rate of pay.

The employer demurred and after failure "to adjust" the dispute with the union, a hearing was held before a "Joint Labor Management Committee," as called for in the collective bargaining agreement. The union's complaint was specified in the minutes of the meeting of the committee to be:

> "**In reference to Article III, Section 4 (a)**, it can be proven by the weekly reports that the wages, as outlined in the section, were not paid for the fabrication of Line Material **in the shop** for the job in question. * * * **The predetermined wage**

[7] Alleged in Paragraph XVIII of Petitioners' Answer as defendant in District Court, at page 13 of Transcript.

[8] The employer alleged in Articles XIX and XX of its answer that it was adhering to its, "normal, unvarying practice of the past twenty years of its operation as an electrical contractor using union labor in paying shop rate of pay," for fabrication work performed in the shop, which practice was previously unchallenged by the union until this occasion.

scale should have been paid, which is presently the same as listed under this section of the contract."

(Emphasis added) Last Paragraph, page 5, and First Paragraph, page 6, Minutes of Meeting of Joint Labor Management Committee, Exhibit III.

Section 4 (a) was the schedule for "construction rates" of pay in the contract.

The Award of the "Committee"

The decision of this committee on this charge was:

"The penalty shall be that Mississippi Valley Electric shall pay the men who preformed [*sic*] work **in the shop at shop rate of pay** on the Line job in question, $353.00 prorated among the men who preformed [*sic*] said work in the shop. This is the committee's estimate of difference of wages to the men."

(Emphasis added) Paragraph 4, page 11 of Minutes of Meeting of Joint Labor Management Committee, Exhibit III.

The $353.00 figure of the award represented the difference, as computed by the committee, without knowledge of the work hours involved, between wages paid the employees at the "shop" rate of pay for the work performed in the shop, and the wages they would have received had they been paid at the higher rate provided in the schedule entitled, "Line Work on Building Trades Job Site."

In addition, this same decision assessed $430.00 of punitive penalties against the employer.

The Makeup of the Committee that Rendered the Award Enforced Below

The Joint Labor Management Committee was composed, in accordance with the collective bargaining agreement, of five men "representing the employer," and five men "representing the union."[9] In fact, the five men allegedly representing the employer were, in truth, his business competitors, other electrical contractors with whom the employer competed for work in New Orleans. The five men representing the union were, of course, the representatives of the charging party.

The employer demurred again from paying an exaction of $353.00 for services **not performed** on "Line Work on Building Trades Job Site."

Suit in District Court Under Section 301

The union filed suit in the District Court for the Eastern District of Louisiana, New Orleans Division, basing the jurisdiction of the original court on Section 301 of the Labor Management Relations Act (1947) 61 Stat. 156, U.S.C., Title 29, Sec. 185. It sued for only $350.00, omitting any claim for the $430.00 of purely punitive penalties. While the complaint, on its face, alleged that the award of the Joint Labor Management Committee was that the employer should pay, "certain of defendant's employees $350.00," the relief prayed for was in the name of the union only, as plaintiff.[10]

Summary Judgment of District Court

In the District Court, the employer admitted all of the above set out facts, but denied the jurisdiction of the court to hear a wage collection claim for accrued wages

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[9] Article I, Sec. 5 of the Contract, Exhibit I, Appendix C at page 71.

[10] "Wherefore, plaintiff demands judgment against defendant in the sum of Three Hundred Fifty ($350.00) Dollars, interest and costs." Prayer of Complaint of Union, page 9 of Transcript.

allegedly due to individuals under their personal contracts of hire. Further, as affirmative defenses, the employer denied that the "Committee" was ever intended to act as an "arbitrator," denied that the "Committee" was capable of functioning as an impartial arbitrator under any commonly accepted definition of the term, and finally, the employer vigorously urged that the award of the "Committee" was unenforceable as being in violent collision with the express terms of the agreement by sustaining "job site" or "construction rates" of pay for work performed in a shop.

After answer was filed, the above issues having been raised and argued on motion to dismiss filed by the employer, and motion for summary judgment filed by the union, the District Court granted the motion for summary judgment, holding on the jurisdictional issue **that the Supreme Court had "beat a retreat"** from its decision in *Association of Westinghouse Salaried Employees vs. Westinghouse Electric Corporation, supra,* when it decided *Textile Workers vs. Lincoln Mills,* 353 U.S. 448. As to the remaining issues raised by the employer regarding the intent of the parties and the capacity of the "Committee" to function as final and binding arbitration, the District Court only commented:

> " • • • The arbitration machinery set up in the contract is what the parties agreed to, presumably because it was best suited for the purpose intended."
>
> Opinion of District Court, Transcript page 61, Appendix A, page 52.

District Court Errs as to Facts of Dispute

As to the employer's final affirmative defense that the "Committee," assuming its function to be "arbitration," had no right to sustain a union claim that was in

conflict with the contract, the District Court missed the point by misconstruing the facts. The fundamental and underlying dispute in this case was that the employer paid the "shop wages," called for in the contract, for work performed in a "shop," while the union and the "Committee," **despite the fact that this work was performed in a shop,** claimed that outdoor "job site" wages should be paid, apparently since the work was intended to become a part of an outdoor construction "job site." This was the essence of the entire dispute, yet these facts were erroneously shifted by the District Court, thereby eliminating the conflict between the union's claim and the terms of the contract. The District Court explained its appreciation of the facts to be:

> "The union charged that while performing a contract for the Dock Board of New Orleans, Mississippi Valley assigned certain work to be done in the shop at the local shop pay rate, **when such work should have been performed** on the job site at the higher line journeyman's wage rate."
>
> (Emphasis added) Decision of District Court, Transcript page 58, Appendix A, page 49.

The statement of the facts changed the union's complaint to bear on the **assignment** and **performance** of work in the shop " * * * when such work **should have been performed on the job site** at the higher line journeyman's wage rate." This was not the case. The union made no claim that the work **should have been assigned or performed on the job site.** The union claimed "job site" wages for "shop work," notwithstanding that the only contract provisions on **"job site" wages** described **"job site" work** only. Thus, the District Court erred as to the bedrock facts of the entire dispute, missed the entire impact of the employer's affirmative defense, and rendered summary judgment founded on such error.

The Court of Appeals Rules "No Jurisdiction"

The employer appealed the summary judgment of the lower court to the Court of Appeals for the Fifth Circuit, urging (1) lack of jurisdiction, (2) no intent of parties to the agreement that this committee should constitute final and binding arbitration and, (3) inherent incapacity of a "Committee" composed solely of interested parties to function as arbitrators, and finally, (4) the erroneous understanding of the facts of the dispute by the lower court.

The Court of Appeals, after oral argument, rendered an original decision on May 10, 1960, stating in the first sentence of its opinion:

> "The **narrow question** upon which this appeal will be decided is **whether** under Section 301 of the Taft-Hartley Act, 29 U.S.C.A., Section 185, **the court below had jurisdiction** of an action brought by the union to recover wages allegedly due individual employees, figured at the rates and under the terms of the Collective Bargaining Agreement between the union and the employer."
>
> (Emphasis added) Original Decision of Court of Appeals, Appendix A, page 52.

The remainder of the Court's decision reveals, in essence, that **the majority reversed the lower court's holding that the Supreme Court had "beat a retreat from Westinghouse,"** and found that there was no jurisdiction, which necessarily precluded any treatment of the remaining issues raised by the employer-appellant. The dissent to this decision emphasized the preoccupation of the Court with the issue of jurisdiction and the *Westinghouse* vs. *Lincoln Mills* topic, characterizing any conflict between these two decisions as due to the fact that on the Supreme Court, at least **the "army changed,"** if the Court did not "beat a retreat" in the second decision.

The union petitioned for rehearing, urging the Court to withhold decision on granting or denying the rehearing until the trio of "arbitration" cases then pending in this Court were decided.[11]

Court of Appeals Reverses Itself

Eight months after the original decision, **and without further hearing,** on December 30, 1960, the Court of Appeals reversed itself, with another dissent, holding that the June 20th *Enterprise Wheel* decision of the Supreme Court controlled in favor of jurisdiction. This reversal was by *per curiam*, the last sentence of which stated:

> "The petition of the appellee for rehearing is granted, and on rehearing the judgment of the District Court is Affirmed."
>
> Per Curiam of Court of Appeals, Appendix A, page 66.

There was no rehearing in fact allowed, despite the Court's statements that, "The petition * * * for rehearing is granted **and on rehearing** * * *," nor was the employer notified by the Court to submit a supplementary brief, or take any other steps that might be considered as notice of intent that the Court was entertaining the thought of any action beyond the possibility of granting the petition for a rehearing. The *per curiam* did not in any fashion refer to the remaining non-jurisdictional issues raised by the employer.

The employer appellant, petitioners herein, filed a petition for rehearing directed at this new decision, pointing out that the issues other than jurisdiction had not been touched and that the Enterprise Wheel decision also

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[11] *Steelworkers vs. American Manufacturing Co.*, 363 U.S. 564 (1960); *Steelworkers vs. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers vs. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960).

supported one of the employer's defenses. This petition was denied, again with one dissent, but without any opinion.

On these facts, petitioners seek a review by this Court.

VI.

REASONS FOR GRANTING THE WRIT

1.

REVIEW SHOULD BE GRANTED TO RESOLVE WITH FINALITY THE CONFLICT ARISING BETWEEN THE WESTINGHOUSE AND LINCOLN MILLS DECISIONS.

There is sufficient doubt as to the meaning of the opinions of the Supreme Court in *Westinghouse* [12] and *Lincoln Mills* [13] to cause the District Court in this case to voice the thought that the Court "beat a retreat" from its first position to its latter position; for two judges of the Court of Appeals to reject such a conclusion, citing the specific distinction made by this Court in Footnote 6 of *Lincoln Mills;* for the dissenting judge on the Court of Appeals to suggest that the Supreme Court may not so much have "retreated," as it may have experienced a change in the "army;" for another judge of the Court of Appeals to reply that he can find neither such a change in faces on the Supreme Court, nor any implication that *Westinghouse* was overruled by either *Lincoln Mills* or *Enterprise Wheel.* All of these varied thoughts have been voiced in the several opinions rendered in this one case, and all reflect a genuine uncertainty as to the law in the area covered by *Westinghouse, Lincoln Mills* and *Enterprise Wheel.*

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[12] *Association of Westinghouse Salaried Employees vs. Westinghouse Electric Corp.*, 348 U.S. 437 (1955).

[13] *Textile Workers Union of America vs. Lincoln Mills*, 353 U.S. 448 (1957).

The final disposition of the question of federal jurisdiction, under Section 301, to collect money due one person by action brought by another was resolved in this case by reliance upon the recent decision of *Steelworkers vs. Enterprise Wheel and Car Corp.*, 363 U.S. 593. That opinion mentioned neither *Westinghouse* nor *Lincoln Mills*. However, the Court did mention, almost in passing, and by footnote only, *Textile Workers vs. Cone Mills Corp.*, 268 F. 2d 920 (C.A. 4th Cir.).

The Court of Appeals for the Fourth Circuit took the view in *Cone Mills* that *Westinghouse*, " • • • **is not controlling in view of the conclusion in the later decision (Lincoln Mills) that Congress intended to place enforcement of the arbitration clauses of labor contracts in the hands of the federal courts, even if the employees are the ultimate beneficiaries.**"[14] The Fourth Circuit would seem to hold, in effect, that *Westinghouse* was emasculated by *Lincoln Mills*. Yet examination of *Lincoln Mills* to see whether or not the Supreme Court in that case rendered a money judgment in favor of the union for wages due employees, reveals that no such thing occurred. *Lincoln Mills* merely ordered the employer to comply with his obligation in favor of the union **to arbitrate.** The only mention of wages in that opinion occurs when the Court cited the pendency of the yet-to-be-arbitrated issue of back pay for increased work loads as grounds to hold the case a "continuing controversy," rather than moot due to dissolution of the employer's business. *Lincoln Mills* was not a wage collection case, as is the present one and as was *Westinghouse*, and it is submitted that the reliance of the Court of Appeals for the Fourth Circuit in the *Cone* case upon *Lincoln Mills* as controlling in all arbitration award wage collection actions is misplaced.

[14] (Emphasis added) *Textile Workers vs. Cone Mills Corp.*, 269 F. 2d 920, at page 924.

Nowhere in *Lincoln Mills* did the Supreme Court state that a union could sue under Section 301 to enforce an award involving the personal contracts of hire between employer and employee, yet the latter proposition was the central issue in *Westinghouse* and in the present case. That question of the enforceability by union action of an arbitration award of wages due employees under the personal contracts of hire with their employer was not reached in *Lincoln Mills*. Nor was that question reached in *Enterprise Wheel*, in that the ultimate controversy there involved a "union obligation." The Supreme Court there, without comment upon the issue of jurisdiction, upheld the arbitrator's award enforcing the **specific punitive penalties in the collective bargaining agreement** that the employer would be penalized for unjust suspension or discharge of employees by having to reinstate the employee and compensate him for wages not earned during his suspension. To this obligation the employer specifically agreed, despite the fact that the employer received no services from the employee under the employee's personal contract of hire during the time he was off the payroll. Such an obligation and enforcement thereof cannot be classified as a "wage collection" case arising out of the personal contract of hire between employer and employee in the same sense as the instant case and *Westinghouse*. The money award in *Enterprise Wheel* did not flow from services performed by the employees, but solely from the collective bargaining agreement between union and employer that the latter would not unjustly discharge, enforced by an obligation of the employer to be responsible "in damages," as it were, for breach thereof.

These facts in *Enterprise Wheel* are in contrast both to the simple and direct wage collection suit brought here and the salary collection action in *Westinghouse*. In the latter case, "the rights in dispute are the claims of indi-

vidual employees to their salaries," for a day on which they were absent.[15] This did not involve a predetermined penalty agreed upon in the collective bargaining contract which the union was attempting to enforce against the employer, as in *Enterprise Wheel*. Rather, it was an attempt by the union to collect, on behalf of four thousand salaried employees, a salary deduction made by the employer for one day's absence. Like the instant case, it involved a dispute over the details of the terms of hire between employer and employee. The Supreme Court characterized such claims in *Westinghouse* as, "uniquely personal rights of employees sought to be enforced by a union," when Justice Burton and Justice Harlan later distinguished the rationale of the *Lincoln Mills* case from that of the earlier *Westinghouse* decision:

> "The District Court had jurisdiction over the action (in *Lincoln Mills*), since it involved an obligation running to a union—a union controversy—and not uniquely personal rights of employees sought to be enforced by a union. Cf. *Association of Westinghouse Salaried Employees vs. Westinghouse Electric Corporation*, 348 U.S. 437, 99 L. Ed. 510, 75 S. Ct. 488."
>
> (Emphasis added) Concurring Opinion of Justices Burton and Harlan in *Lincoln Mills*, 353 U.S. at 460.

These Justices in *Lincoln Mills* were repeating the exact phrases used by Mr. Chief Justice Warren and Mr. Justice Clark in the latters' concurring opinion in *Westinghouse* where they stated:

> "For us the language of Section 301 is not sufficiently explicit nor its legislative history sufficiently clear to indicate that Congress intended to authorize a union to enforce in a Federal Court

[15] *Association of Westinghouse Employees*, 210 F. 2d 623 (1954-C.C.A. 3).

> the **uniquely personal right** of an employee for whom it had bargained to receive compensation for services rendered his employer."
>
> (Emphasis added) *Association of Westinghouse*, 348 U.S. at 461.

These words, in turn, were written in support of the *Westinghouse* majority opinion of Mr. Justice Frankfurter, joined by Mr. Justice Burton and Mr. Justice Minton. Mr. Justice Reed also concurred with Justices Frankfurter, Burton, Minton, Clark and Chief Justice Warren on this particular point by stating:

> "The reason, I think, that this union cannot recover from this employer in this suit under Section 301 is that the claim for wages for employees arises from separate hiring contracts between the employer and each employee. The union does not undertake to do work for the employer or even to furnish workers. The duty, if any there be, to pay wages to an employee arises from the individual contract between the employer and emloyee, not from the collective bargaining agreement. Therefore, there is set out no violation of a contract between an employer and a labor organization as is required to cover jurisdiction under Section 301. The facts show an alleged violation of a contract between an employer and an employee—a situation that is not covered by the statute."
>
> *Association of Westinghouse*, 348 U.S. at 464.

Therefore, as to the right of a union to collect wages for employees under Section 301, Justices Frankfurter, Burton, Minton, Clark, Reed and Chief Justice Warren would disallow such a suit, as they did in *Westinghouse*. Justice Harlan, who, while taking no part in that decision, concurred with Justice Burton in *Lincoln Mills* on this point, making a majority of seven of the eleven jus-

tices who considered either the *Lincoln Mills* or the *Westinghouse* cases.[16]

The thrust of the *Lincoln Mills* decision was directed at the right of the federal courts to absorb more than procedural law from Section 301. In *Lincoln Mills* the District Court, the Court of Appeals and the Supreme Court all agreed that the Federal Court had **jurisdiction** to hear the complaint of a breach of the contractual obligation to the union to arbitrate.

The Court, in *Lincoln Mills*, took particular pains to distinguish, on the facts, its recent holding in *Westinghouse* that 301 granted no statutory right for a union to collect wages due to others. The Court flagged this distinction in two places, in their Footnote 6, and in the concurring opinion, with obvious intent that the *Westinghouse* decision should stand unweakened.

However, the question specifically raised by this case is, has the present Court now overruled *Westinghouse* and proceeded a step further than *Lincoln Mills* by its *Enterprise Wheel* decision? Petitioners submit that this most recent Supreme Court decision, with its sparse footnote treatment of the jurisdictional issue and particular facts, is only authority for the proposition that under Section 301 there is federal jurisdiction to enforce an arbitrator's award of a specific contractual obligation of an employer running in favor of the union. This case does not, therefore, undercut the holding of *Westinghouse* that Section 301 was never intended to impose upon the federal court system multitudinous union actions for simple wage claims arising out of the contracts of hire between employer and employee.

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[16] The remaining four who were present at the time of either case: Justices Black, Douglas, Brennan and Whitaker.

In any event, the issues raised here, as shown by the variety of opinions of the judges below, indicate the necessity of review by this Court to give further guidance to the lower courts and the bar, as well as to labor and management, in this still obscure area of the law.

2.

IN THE NEWLY FASHIONED AND EXPANDING FIELD OF FEDERAL ENFORCEMENT OF LABOR ARBITRATION AWARDS, IN THE ABSENCE OF ANY EXISTING SUPREME COURT JURISPRUDENCE, REVIEW SHOULD BE GRANTED TO DELINEATE THE BOUNDS OF IMPARTIALITY REQUIRED OF LABOR ARBITRATORS.

In the trio of *Steelworkers* cases decided on June 20, 1960, the Supreme Court has begun to fill in the previously vacant area of federal policy on enforcement of labor arbitration. The Court has instructed that the federal "policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play."[17] The term "full play," and indeed, the thrust of all three decisions is in the direction of a "hands off" mandate to the judiciary, at least, insofar as re-examining the merits of an arbitrator's legitimate award. The underlying motivation of the Court in adopting such a course is the desire "to promote industrial stabilization through the collective bargaining agreement,"[18] and its awareness that "arbitration is the substitute for industrial strife."[19] Petitioners urge that if the legitimate de-

[17] *Steelworkers vs. American Manufacturing Co.*, 363 U.S. 564, at page 566.

[18] *Steelworkers vs. Warrior Navigation Co.*, 363 U.S. 574, at page 578.

[19] *Steelworkers vs. Warrior Navigation Co.*, 363 U.S. 574, at page 578.

cisions of arbitrators are to be given a nearly unreviewable status, should not clear and firm standards of personal disinterest and a background of impartiality be prerequisite for the parties who act in this judicial capacity? The Supreme Court recognized the vital effect of arbitration in its statement that:

> "But the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government."
>
> *Steelworkers vs. Warrior Navigation Co.*, 363 U.S. 574, at page 581.

The significance of that comment is borne out by this petitioner's effort to resolve this present difficulty, surely not for the sake of the paltry $350.00 involved, but because of the far reaching future effects this decision will have on his business, his ability to compute his labor costs on job bids, his relations with his union employees and his competitors.[20]

The issues raised here are: Must the arbitrator have a background of impartiality and a lack of personal interest in the dispute? In the absence of such a background, are his awards enforceable in the federal courts? Can the processes of an interested partisan group be designated as "arbitration?"

The Supreme Court has yet to rule on any prerequisite qualifications of arbitrators, except to touch upon the expertise of the labor arbitrator in his field.[21]

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[20] " * * * A court's erroneous findings of fact in a particular litigation may work an injustice to the litigants but rarely disturb the future; similar error by an arbitrator may cause more harm by disturbing the parties' continuing relationship than by the injustice in the particular case." *Reason, Contract and Law in Labor Relations*, by Harry Shulman, 68 Harvard Law Review, at page 1017.

[21] *Steelworkers vs. Warrior Navigation Co.*, 363 U.S. 574, at page 582.

However, there are other authorities who impose a prerequisite of fairness, impartiality and disinterest upon arbitrators. The term "arbitration" has come to express the process, quasi-judicial in nature, whereby during the life of a contract both sides submit a dispute as to interpretation of the contract to an impartial, **disinterested third party,** the arbitrator, or, in some cases, to a tripartite board that invariably contains one **neutral** chairman whose unbiased decision determines the outcome of the case.[22] The late Dean Shulman, often quoted by the Supreme Court, states:

> "The method employed by almost all industry today is the resolution of stalemates in the adjustment of grievances under the private rule of law established by the collective agreement for private arbitration **by a neutral person.** The largest enterprises provide for a standing umpire or arbitrator to serve for a stated period of time or so long as he continues to be satisfactory to both sides. The great majority of agreements provide for separate appointment of an arbitrator in each case * * * ."
>
> (Emphasis added) Reason, Contract and Law in Labor Relations, by Harry Shulman, 68 Harvard Law Review, at page 1007.

This concept of the decision by an impartial third party is essential to the voluntary acceptance of the principle of arbitration as a substitute for industrial warfare. From the origins of arbitration in commercial contracts, through the early days of its stimulation in the field of industrial relations by the War Labor Board and down to its present widespread use today, there has remained constant throughout the indispensable factor of

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[22] "When issues between two contending parties are submitted to **an impartial third party or board** for his or its decision, the procedure is known as arbitration * * * " *Industrial Relations and the Government*, by Wayne L. McNaughton and Joseph Lazar, page 401. (Emphasis added)

the impartial chairman or arbitrator.[23] Quite often there is specific machinery in the contract whereby the impartial arbitrator is chosen from a "panel" of names provided by either the Federal Mediation and Conciliation Service or the American Arbitration Association. Many contracts name a permanent arbitrator, a person whose integrity, impartiality and prior decisions have inspired the confidence of both parties. On occasion some contracts name a panel of several permanent arbitrators who are called upon either in rotation or chosen by the parties alternately striking names from the list until only one remains. There are also contracts which provide that application will be made to a state or federal judge for his appointment of an *ad hoc* impartial arbitrator.

The method of securing the arbitrator may vary, but a constant factor is the "impartial third party" whose judgment will be accepted as unprejudiced. The Director of the Federal Mediation and Conciliation Service, exercising his expertise, has exhibited official concern over

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[23] "The tribunals under the War Labor Board were organized on the tripartite principle, with the public panel member acting as chairman over the representatives of management and of labor. In my experience since the war, the organization of the boards has varied greatly, dependent particularly on contractual stipulation, but still more dependent upon the practice of the parties. Some contracts provide for a single arbiter. In other instances, the stipulation is for a tripartite system, and the board actually functions in that manner. At still other times I have been informed that, while technically the tribunal is tripartite, in fact I am to make the decision on my own responsibility and without the formality of a meeting of the board as such after the testimony is taken. Sometimes, in such a situation, the nominally partisan members will function as such to the extent of sitting with the arbitrator and assisting in the development of the positions of their respective principals by questioning the witnesses or by suggesting points to be cleared up. Sometimes, they act, instead, as leading counsel for their sides. On other occasions they are present merely as spectators. In some instances the contract, after providing in terms for a tripartite arbitration board, abandons this principle by providing that the impartial arbitrator shall make the decision." *A Labor Arbitrator Views His Work*, by Maurice H. Merrill, Public Panelist, War Labor Board, Eighth Region (1943), 10 Vanderbilt Law Rev. 790.

the acceptance of his arbitrators as impartial and unprejudiced.[24]

The authors of "Industrial Relations and the Government," in discussing arbitration under the Railway Labor Act have commented on the need for qualified neutral arbitrators:

> " • • • If technically qualified and disinterested individuals were readily available, there might be greater willingness to submit rules disputes to arbitration. Unfortunately the training ground for experience in the railroad or airline labor field is usually, and perhaps necessarily, found in positions of management or labor, and **these positions by their nature are partisan and tend to disqualify the persons for the roll of impartial, neutral arbitrator.** The problem of recruiting and training the qualified **neutral** arbitrator in this field must be solved if parties are to submit their disputes to arbitration more willingly."
>
> (Emphasis added) *Industrial Relations and the Government*, by Wayne L. McNaughton and Joseph Lazar, page 125.

Another author on this subject has commented:

> "An arbitrator must be **absolutely free from partisanship,** even if his honesty and integrity are unquestioned. If he has in the past stirringly urged labor's cause and held that the interests of labor and management are irreconcilable, the court

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[24] 29 Code of Federal Regulations Part 1404—Arbitration, Section 1404.2 " • • • (Arbitrators employed full time as representatives of management or labor are not included on the Service's roster)"

Section 1404.8 " • • • Industrial peace and good labor relations are enhanced by arbitrators who function justly, expeditiously and impartially so as to obtain and retain the respect, esteem and confidence of all participants in the arbitration proceeding."

Section 1404.10—Importance of Impartiality. " • • • Their [the arbitrators'] **acceptability** can be advanced not alone by the soundness of their decisions, but also by the **impartial manner** in which the entire arbitration proceeding is conducted." (Emphasis added)

will remove him. (*Western Union Telegraph Co. v. Selly*, 1 Lab. Arb. 553 (N.Y. Sup. Ct.), aff'd., 270 App. Div. 839, 61 N.Y.S. 2d 910 (1st Dep't.), aff'd., 295 N.Y. 395, 68 N.E. 2d 183 (1946).) A court vacated an arbitration award and directed a rehearing before a new arbitrator because the arbitrator had previously served as labor-appointed member of a three-man panel which heard a controversy involving the same issue. (*Osman v. Belding Heminway Co.*, 4 Lab. Arb. 843 (N.Y. Sup. Ct. 1946).)"

(Emphasis added) The Law and Practice of Labor Contract, Benjamin Werne, Vol. 2, pages 228, *et seq.*

Still another expert in this area has stated:

"• • • Apart from that, certain general principles concerning the desirable basic qualifications of labor arbitrators have developed nearly everywhere.

"• • • Moreover, arbitration, being a quasi-judicial procedure, must be performed by persons who act as impartially as judges. It has become generally accepted theory — though not always practice — that the individual arbitrator should be free from partisanship and prejudice, **should not be personally, financially or commercially interested in one of the parties or in the result of the proceedings,** should not be connected with either party through family, friendship, or employment relations, **and should not be under any kind of obligation to support anyone's position.** As expressed by an American Court:

"'An arbitrator acts in a quasi-judicial capacity and should possess the judicial qualifications of fairness to both parties so that he may render a faithful, honest and disinterested opinion • • • he must lay aside all bias and approach the case with a mind open to conviction and without regard to

> his previously formed opinions as to the merits of the party or the cause. He should sedulously refrain from any conduct which might justify even the inference that either party is the special recipient of his solicitude or favor.' "
>
> (Emphasis added) *Labor Disputes and Their Settlement*, by Kurt Braun, Chapter VI, Principles of Arbitration, at page 201, *et seq.*

The United States Court of Appeals for the Sixth Circuit has commented upon the nature of arbitration and the qualifications of arbitrators in like manner in *Kentucky River Mills v. Jackson*, 206 F. 2d 111 (1953):

> " * * * For arbitrators are selected to act in a quasi-judicial capacity, in the place of a court, and must be fair and impartial so as to render a faithful, honest and disinterested opinion, in carrying out their obligation to do justice to the parties through their award. *Davy v. Faw*, 7 Cranch 171, 3 L. Ed. 305, *American Eagle Fire Ins. Co. v. New Jersey Insurance Co.*, 240 N.Y. 398, 148 N.E. 562."

In contrast to these authorities, the District Court, by summary judgment, and the Court of Appeals, without written opinion, held that **a committee of adversaries** was a "fair and final method for settlement of disputes."[25] This decision was reached despite the availability of a more plausible alternative under the contract language.

Provision was made in the instant case for three steps in the grievance procedure. The first step provided for a meeting between the two parties in dispute.[26]

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[25] Opinion of District Court, page 62 of Transcript, Appendix A, page 52.

[26] Article I, Section 6: "All grievances or questions in dispute shall be adjusted by the duly selected representatives of both parties to this agreement. In the event that these two are unable to adjust any matter within 48 hours, they shall refer same to the Joint Labor Management Committee."

The second step refers unadjusted disputes to a Joint Labor Management Committee consisting of five "representing the employer," and five "representing the union."[27] For the third step, in the event the second step committee should "fail to agree or **to adjust,**" the dispute is referred to a national body known in the electrical industry as the Council on Industrial Relations for the Electrical Industry for the United States and Canada.[28] The contract provides clearly that it is the decision of this counsel, in the third and last step, which "shall be binding and final on both parties hereto."

This dispute proceeded only to the second step where the committee, composed one-half of local electrical contractors competing with the employer in this case, and the other half of members and officers of the union that initiated the charges, rendered, to no one's surprise, a decision adverse to the employer, and in conflict with the agreement itself.

The District Court interpreted the contract to give the committee in the second step the power to decide the issues, as in arbitration, in a final and binding manner. It reasoned, in agreement with the union's contention, that the committee of adversaries was, "comprehensive, fair and final method for settlement of disputes."[29]

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[27] Article I, Sections 5 and 6. Section 5: "There shall be a Joint Labor Management Committee of five (5) representing the Employer and five (5) representing the Union. It shall meet regularly at such stated times as it may decide. However, it shall also meet within 48 hours when notice is given by either party. It shall select its own Chairman and Secretary."

[28] Article I, Section 8: "Should this Committee fail to agree or to adjust any matter, such shall then be referred to the Council on Industrial Relations for the Electrical Industry for the United States and Canada. The decision of the Council shall be binding and final on both parties hereto."

[29] Opinion of District Court, page 62 of Transcript, Appendix A, page 52. The District Court assessment of the "Committee" as "fair" was made without evidence and with a wholly erroneous appreciation of the facts of the dispute. This error and its effect will be discussed in point 4 of this brief, *infra*.

The employer pointed out in the courts below that the contract specifically provided that only the national "Council," removed by distance at least from a competitive interest in the dispute, should be the "binding and final" arbiter.[30] The employer also urged that the contract language in Article I, Section 8, gave the right to the employer to refuse to accede to any solution proposed by the committee in providing that, "Should this Committee fail to agree **or adjust** any matter, such shall then be referred to the Council * * * ."

However, the District Court below held that the second step must be given the status of arbitration, since, " * * * the arbitration machinery set up in the contract is what the parties agreed to * * * ," thereby bypassing the point raised that the second step was neither intended nor capable of performing the function of arbitration.

The Supreme Court recently held:

> "In our role of developing a meaningful body of law to govern the interpretation and enforcement of collective bargaining agreements, we think special heed should be given to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve."
>
> *Steelworkers vs. American Manufacturing Co.*, 363 U.S. 564, at 567.

In *Steelworkers vs. Warrior Navigation Co.*, the Court recognized that:

> "When most parties enter into contractual relationships they do so voluntarily, in the sense that there is no real compulsion to deal with one another, as opposed to dealing with other parties.

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[30] Further, Section 9 of Article I, referring to the Joint Labor Management Committee, and the Council on Industrial Relations for the Electrical Industry respectively, refers to the functions of those bodies as "conciliation" and "arbitration."

This is not true of the labor agreement."
(Emphasis added) *Steelworkers vs. Warrior Navigation Co.*, 363 U.S. 574, at 580.

The coercive, non-voluntary nature of these agreements being accepted as part of the labor law field, it would seem that if a bargaining agreement offers a choice of interpretation, as does the instant one, between what is patently a partisan, partial arbitration group on the local level, and a national group at least removed by distance from local competitive strife, the courts should favor the latter interpretation.

In summary on this point, review by the Supreme Court on the issue of what standard of disinterest or neutrality is a condition precedent to designating the processes of any individual or group as "arbitration" would fill a gap in the federal law on labor arbitration occupied now only by the authors cited above. It is submitted that guidance from the Court in this area is necessary and timely, in view of the Court's determination that arbitration of labor disputes is to be given "full play."

3.

THE RULING OF THE COURT BELOW IS CONTRARY TO THE SUPREME COURT'S DECISION IN STEELWORKERS VS. ENTERPRISE WHEEL AND CAR CORPORATION THAT ARBITRATORS ARE CONFINED TO INTERPRETATION AND APPLICATION OF THE COLLECTIVE BARGAINING AGREEMENT.

As set out heretofore in the Statement of the Case, the basic dispute here was the refusal of the employer to pay outdoor construction "job site" wages for work performed in his shop, as claimed by the union. From

this basic dispute there flowed the subsequent issue of the enforceability by action under Section 301 of an award by an alleged arbitration group supporting the unions' claim. The precise legal question raised by petitioner here is, was the award of the alleged arbitration body permissible "interpretation" or "application" of the collective bargaining agreement, and thus enforceable, or was it unenforceably violative of the express terms of the agreement.

The agreement provides four scales of pay, two of which are not pertinent, the "minimum rate" contained in Article III, Section 4, at page 11 of Exhibit I, and the "ship repair" rates in Article IV, Section 1, at page 24 of Exhibit I. The remaining two rates are involved in determination of this issue. The union agrees that the question before the arbitration body was:

> " * * * whether the 'shop rate' or 'construction rate' should have been paid employees for this work."
>
> Supplemental Memorandum by Plaintiff in Support of Motion for Summary Judgment, page 54 of Transcript.

The so-called "shop rate" was paid for work performed in the shop. This fact was undisputed and incorporated in the "Committee's" award, and the decision of the District Court:

> "The penalty shall be that Mississippi Valley Electric shall pay **the men who performed work in the shop at shop rate of pay** * * *."
>
> Decision of District Court, page 58 of Transcript, Appendix A, page 49.

The union charged that the "construction rate" should have been paid, and the "Committee" agreed. Even with-

out looking at the contract, it would seem inescapably logical that shop rates of pay would apply to work performed in a shop and construction rates of pay to job site construction work. Petitioner will not belabor this point. On examination of the provisions involving the "construction rate" the contract reveals the following:

"Section 4-A. LINE WORK ON BUILDING TRADES JOB SITE.

LINE WORK:

Foreman, General	*Not less than prevailing Building Trades rate.*
Foreman	*Not less than prevailing Building Trades rate.*
Lineman, Journeyman	*Not less than prevailing Building Trades rate.*
Linemen, Apprentices:	
1st 6 months	*40% of Journeyman rate*
2nd 6 months	*45% of Journeyman rate*
3rd 6 months	*50% of Journeyman rate*
4th 6 months	*55% of Journeyman rate*
5th 6 months	*60% of Journeyman rate*
6th 6 months	*65% of Journeyman rate*
7th 6 months	*70% of Journeyman rate*
8th 6 months	*75% of Journeyman rate*
Operators, Hole Digging Equipment	*75% of Journeyman rate*
Operators, Tractor with Winch and Derrick	*75% of Journeyman rate*
Operators, Tractor with Towing Winch	*65% of Journeyman rate*
Operators, Line Truck with Winch and Derrick working in hot lines	*75% of Journeyman rate*
Operator, Pole Truck and Trailer, or pole hauling and setting truck (not in energized Lines)	*65% of Journeyman rate*

Operator, Truck
without Winch ..... *45% of Journeyman rate*
Ratio of Apprentices: One (1) Apprentice shall be allowed for every one (1) Journeyman Lineman employee."

Article I, Section 4-A, of the Collective Bargaining Agreement between Union and Employer, Exhibit I.

The very title of the section veritably shouts that the wage schedule to follow is applicable **on a job site.** What kind of a job site? A "Building Trades" job site. What is a "Building Trades" job site? The union applies the terms "construction rate" to the wages here involved in its own memorandum. What kind of work is performed on a building trades job site that calls for "construction rates" of pay? "Line Work." What is "Line Work?" Examination of the job classifications listed in the wage schedule above shows that "Line Work" involves hole digging, tractors, derricks, towing winches, pole trucks, trailers and pole hauling, all of which are manifestly inapposite to work that would take place within a shop. Clearly Section 4-A applies to outdoor construction work on electrical poles and power lines.

That the union should question the payment of shop wages for work performed within the shop, or contend that the contract calls for "construction" job site rates for work performed within a shop, strains the credulity of anyone capable of reading the contract provisions. The attention of the Courts below was directed to the bizarre nature of the union's complaint by the employer's answer to the complaint in the District Court:

"XVIII.

"That in December of 1958 defendant was paying the proper shop rates of pay to its employees while

they were engaged in certain work in its shop, to wit: the fabrication of certain metal supports for an outdoor lighting construction job on Morrison Road in New Orleans.

XIX.

"That, as this fabrication work was being performed, in the shop of the defendant and not on the 'building trades job site,' **defendant was adhering to its normal unvarying practice of the past twenty years of its operation** as an electrical contractor using union labor in paying the shop rate of pay.

XXI.

"That at no time during the past twenty years, during which the plaintiff union has always been aware of the details of work performed and pay received by defendant's employees, has the plaintiff union ever before taken exception to defendant's payment of shop rates for this type of fabrication work."

(Emphasis added) Answer of Employer, pages 13 and 14 of Transcript.

Were this not enough to alert the Courts below that the union's claim was frivolous and the committee's award illegitimate, the very nature of the work itself, fabrication of metal parts, is descriptive of a process patently unsuitable for performance by men engaged outdoors as "Linemen," "Operators — Hole Digging Equipment," "Operators—Tractor with Winch and Derrick," "Operators—Tractor with Towing Winch," "Operators—Line Truck with Winch and Derrick Working in Hot Lines," "Operator — Truck without Winch." These classifications, called for under Section 4-A of the contract, could not conceivably be further removed from the description of a job of fabricating metal parts. Indeed, had the employer paid the "job site" wage rates of Section 4-A to

the men who performed the disputed work, in the shop, then would the charge lie that the contract had been violated.

To say that the employer violated Section 4-A of Article III by paying shop wages for work performed in the shop is to say that black is white and square is round. Yet, that is the charge of the union, and the exact specific award of the "Committee" enforced by the summary judgment of the District Court and affirmed by the Court of Appeals for the Fifth Circuit:

> "The penalty shall be that Mississippi Valley Electric shall pay **the men who performed work in the shop at shop rate of pay** on the line job in question, $353.00, prorated among the men who performed said work in the shop. This is the Committee's estimate of difference of wages due the men."
>
> (Emphasis added) Award of Joint Labor Management Committee as set out in Decision of District Court, page 58 of Transcript, Appendix A, page 59.

The facts are clear and undisputed. The contract language is simple and unambiguous. But the award of the alleged arbitration body is the *ne plus ultra* of what ought not to have been done in the premises. There must be some point at which the license to "interpret" and "apply" the terms of an agreement becomes an abuse.[31] The decision of the alleged arbitrators needs something more to recommend it than the qualities of tyranny.

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[31] The minutely detailed contract here gives abundant evidence that the parties, through their negotiators, spelled out special provisions for any departure from the four basic wage schedules set out in the contract. Such fine details as are to be found in Sections 2, 3, 4 and 5 of Article IV, appearing at page 31 of the contract, Exhibit I, do not support any speculation that had the parties intended that construction rates apply to fabrication work within a shop, they would have left such a substantial issue for the future inventiveness of the "Committee" or any other third party.

While this Court has made plain its policy to refuse a substitution of its judgment for an arbitrator on the merits of an industrial dispute, it has also clearly marked the boundary for an arbiter's inventiveness:

> "Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may, of course, look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."
>
> *Steelworkers vs. Enterprise Wheel & Car Corp.*, 363 U.S. 593, at 597.

Petitioners submit that this award oversteps the limits set out above, and is illegitimate. Not only does it fail to draw "its essence from the collective bargaining agreement," but it is in violent collision with the clear and specific terms thereof.[32] If this decision stands in its present state, then the written words of any labor contract signify nothing more than what the whim of any arbitrator or any "Committee" choose to make of them at any given moment. The enforcement of such a travesty cannot further either the cause of arbitration, collective bargaining or industrial peace. Effective collective bargaining, as well as good faith, requires that parties live up to their agreements, and that neither party attempt or succeed in securing by arbitration what it could not

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[32] The Court of Appeals for the Sixth Circuit recently refused to enforce an arbitrator's decision holding that the arbitrator, "was prohibited by the contract from making such a determination," and distinguishing such illegitimate awards from those considered by the Supreme Court in the trio of *Steelworker* cases. The Sixth Circuit particularly pointed out that the award enforced by the Supreme Court in *Enterprise Wheel* was based "on a **legitimate construction** of the collective bargaining contract." *Local 791, I.U.E. vs. Magnavox Co.*, ... F. 2d ....., at .....

obtain by negotiation. Moreover, the decision of the District Court, affirmed without opinion by the Court of Appeals, is in direct conflict with the applicable *Enterprise Wheel* decision, as quoted above, that, "When the arbitrator's words manifest an infidelity to this obligation (to draw the essence of his award from the agreement), **courts have no choice but to refuse enforcement of the award.**" Review should be granted to correct this conflict.

4.

THE COURT'S POWER OF SUPERVISION SHOULD BE EXERCISED WHERE A COURT OF APPEALS SANCTIONS A DEPARTURE BY A LOWER COURT FROM RULE 56 OF THE FEDERAL RULES.

The Court of Appeals here affirmed, without opinion or reasons, a summary judgment granted by a District Court under Rule 56 of the Federal Rules of Civil Procedure.[33] Petitioners submit that there has been a novel misapplication of that Rule in the instant case by the District Court, sanctioned by the Court of Appeals, and review should be granted to correct the departure of the Court of Appeals from the decisions of this Court on the subject of Rule 56.[34]

As to Rule 56, which allows a trial court to eliminate trial when there are no issues of fact and the mover is entitled by law to recover, the issue here is a novel one. The usual complaint registered against the use of summary judgment is that there existed an issue of fact on the record that the trial judge disposed of without

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[33] Pertinent sections of Rule 56 are set out in Appendix B, page 69.

[34] *Sartor vs. Arkansas Natural Gas Corp.*, 321 U.S. 620, at 627 (1944).

affording the parties the right of trial by jury, cross-examination, etc.[35]

This problem has caused courts of appeals and the Supreme Court to frequently admonish trial courts for incautious use of Rule 56 in their attempt to clear their overcrowded docket.[36]

However, petitioners have been unable to discover a case similar to this wherein the Trial Court's mistake lay not in over hasty resolution of disputed fact, **but in erroneous understanding of undisputed facts.**[37]

Here, the union complainant made twelve allegations of fact in Article 2 through 12 of its petition.[38] The employer defendant admitted all twelve allegations in its answer,[39] and then, in addition to denying jurisdiction, interposed certain affirmative defenses beginning at Article XIV and running through Article XXV of its answer.[40] The affirmative defenses have been discussed

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[35] Moore's Federal Practice, Vol. 6, Rule 56, Section 56.15(1).

[36] "We take this occasion to suggest that trial judges should exercise great care in granting motions for summary judgment. A litigant has a right to a trial where there is the slightest doubt as to the facts, and a denial of that right is reviewable; but refusal to grant a summary judgment is not reviewable. Such judgment, wisely used, is a praiseworthy timesaving device. But, although prompt dispatch of judicial business is a virtue, it is neither the sole nor the primary purpose for which courts have been established. Denial of a trial on disputed facts is worse than delay. Cf. *Arenas v. U. S.*, (1944) 322 U.S. 419. The district courts would do well to note that time has often been lost by reversals of summary judgments improperly entered."
Doehler Metal Furniture Co. v. U. S., (C.C.A. 2d, 1945), 149 F. 2d 130.

[37] Whether the facts be in dispute or mistakenly construed would seem to be immaterial, however, under the Supreme Court's holding that:

> "The Court of Appeals below heretofore has correctly noted that Rule 56 authorizes summary judgment **only** where the moving party is entitled to judgment as a matter of law, **where it is quite clear what the truth is.** * * * "
> (Emphasis added) *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, at 627.

[38] Pages 2 through 9 of Transcript.

[39] Pages 10 through 12 of Transcript. Article I of the Complaint, relative to jurisdiction, was denied by defendant, page 10 of Transcript.

[40] Page 12, *et seq.* of Transcript.

heretofore. However, before the Trial Court could apply the correct substantive law to any of these affirmative defenses, it was essential that the Court understand **the facts.** These facts of the basic dispute were to be found in four places in the pleadings; first, in the minutes of the meeting of the Joint Labor Management Committee, which minutes were attached by the union to its complaint, marked Exhibit III; secondly, in the provisions of the agreement between the parties, also attached to the union's complaint, marked Exhibit I; thirdly, in the original claim by the union in letter form, attached by it to the complaint at Exhibit II; and finally, as summarized in the answer of the employer, particularly from Article XVIII through Article XXII. The precise and material fact of the original dispute that the Trial Judge failed to comprehend was the claim of the union, as granted by the committee:

> " * * * the plaintiff (union) and the Joint Labor Management Committee have based their claim for the additional $350.00 that is the subject of this suit, upon **a claim that defendants' employees, while working in the 'shop,' should have been paid the construction job site rate of pay."**
>
> (Emphasis added) Article XXI of Employer's Answer, page 15 of Transcript.

The union's claim, although clearly set out in the answer of the employer, and documented by the exhibits filed by the union, was completely misconstrued by the Trial Judge, who thought that:

> "The union charged that while performing a contract for the Dock Board of New Orleans, Mississippi Valley assigned certain work to be done in the shop at the local shop pay rate **when such work should have been performed on the job site at the higher line journeyman's wage rate."**

(Emphasis added) Opinion of District Court, page 58 of Transcript, Appendix A, page 49.

This error did not involve disputed **legal** conclusions, presumptions or inferences drawn by either of the parties in their pleadings which could be properly resolved by the Trial Judge in his application of substantive law. This error was as to the **facts** of the dispute, **the most basic fact** involved in the affirmative defense set up by the employer. The true facts of the dispute, as found in the pleadings of both parties, were evidence of an outright **revision** of the contract by the award of the committee. Such revision was unenforceable by action under Section 301 as beyond the committee's authority under the applicable law.[41]

However, the Trial Judge applied the law to facts that were not before him; facts that undercut the affirmative defense of the employer in that the union's claim was believed by the Trial Judge, and, in the latter's written opinion, made to appear, to be far more plausible than it was. The actual claim of the union, sustained by the award of the partisan committee, was a crude assault and battery on the plain language of the contract. On the other hand, the Trial Judge's erroneous appreciation of the union's claim conceivably placed it within the legally enforceable license permitted an arbitrator to fill in gaps left in a contract by the negotiators.[42] Where the actual claim of the union for construction site wages for shop work ran head-on into the specific words of the very article of the contract on which the claim was based,[43] the claim in the mind of the Trial Judge involved a work assignment issue not covered in the con-

[41] *Steelworkers vs. Enterprise Wheel & Car Corp.*, 363 U.S. 593, at 597, as discussed in detail in point 3 of this petition.

[42] *Steelworkers vs. Warrior Navigation Co.*, 363 U.S. 574, at 580, 581.

[43] Article I, Section 4-A.

tract, and thus possibly fair game for an arbitrator's inventiveness. Thus, on the latter basis, the Trial Judge may have applied the correct substantive law to the undeniably wrong set of facts.[44] Had he applied the correct substantive law, as discussed in point 3 of this brief, to the only facts to be found in the record, the affirmative defense of the employer should have been sustained and the motion for summary judgment should have been denied on the basis that the union was not entitled to judgment **by law.**

Rule 56 was mistakenly applied due to a novel error by the District Court, and the Court of Appeals affirmed this procedure without reasons or any apparent consideration of this point as it was duly raised by the employer in its brief to that Court. Rule 19 of the Supreme Court's Rules suggests that the supervisory power of review should be exercised "Where a court of appeals * * * has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's

[44] Assuming the Trial Judge's enforcement of the committee's award, that the additional wages should be paid, was based on his application of the law that the committee, as an arbitration body, had authority to fill a gap in the contract on the issue of **where**, geographically, certain types of work should be performed, there is still doubt that under these erroneous facts the lower court applied the correct substantive law in granting summary judgment. In *Steelworkers vs. Warrior Navigation Co.*, which appeared after the Trial Court's decision, the Court's opinion suggested that the arbitrator might properly fill in gaps in a collective bargaining agreement. But it seemed to qualify this right with the thought that these gaps "may be left to be filled in **by reference to the practices of the particular industry and of the various shops** covered by the agreement." 363 U.S. 574, at 580. The employer alleged in his answer, Article IX and XX, and it was undenied by the union, that it had been his unvarying practice for twenty years to pay shop wages for shop work of this type and the union had never complained before. Therefore, the award of the committee, even if based on the non-existent union claim relating to geographic work assignment, transgressed upon the long established practice of the shop and thus apparently exceeded the limitations of an arbitrator's inventiveness as generally outlined by Justice Douglas in the case cited above.

power of supervision." Such error in regard to Rule 56 has been sanctioned by a Court of Appeals in this instance and review should be granted in the premises.

5.

REVIEW SHOULD BE GRANTED WHERE APPELLEE COURT DEPARTS FROM THE USUAL AND ACCEPTED PROCEEDINGS ON REHEARINGS AND AT THE SAME TIME OVERLOOKS ALL ISSUES IN THE CASE EXCEPT JURISDICTION IN ITS WRITTEN OPINION.

The Supreme Court's Rule 19 suggests that review by the Court is merited when lower courts depart from "the **accepted and usual** course of judicial proceedings." The judicial proceedings in the Court of Appeals in this case fall within that area. It is neither unusual nor accepted judicial practice to deny a litigant a reasonable opportunity to be heard. Neither is it usual for an Appellate Court to render judgment on the merits without a word of explanation as to the Court's reasoning on the issues presented by the case.

The Appellate Court received briefs and heard argument on three alleged errors of the District Court containing a mixture of law and fact, in addition to the purely legal issue of jurisdiction. It foreclosed its own consideration of these points by holding "no jurisdiction" in its May 10th decision, specifically restricting its opinion to that "narrow question." Although its May 10th decision was based upon the majority's appreciation of the law as it existed on that day, the Court generously heeded a plea from the union to abstain from immediate disposition of its petition for rehearing on the chance that the Supreme Court might, in the near future, throw more light upon a shadowy corner of the law. Eight months

later (from May 10th to December 30th) the Court, without giving the employer-defendant the opportunity to be heard, reversed itself on jurisdiction, basing its about-face upon the impact of the new law * * * the trio of *Steelworker* decisions of this Court. This new law, arising since the original hearing, was never the subject of a hearing or brief in which the employer-defendant participated. The fact that the very applicability of these decisions to the case at hand was subject to a reasonable doubt is demonstrated by the dissent of Judge Cameron, who stated:

> "I do not think the cases now cited [the *Steelworker* cases] by the majority overrule or modify *Association of Westinghouse Salaried Employees vs. Westinghouse Electric Corp.;* and I do think this case is governed by that decision."
>
> " * * * I do not think it should be lightly inferred that in the midst of 'the complex and baffling problems of our time' the highest court in the land would not be straining hard to give stability to the law as written in judicial decisions. I see nothing in any of the cases cited by the majority [the *Steelworker* cases] here which tempts me to any other conclusion."
>
> Dissent of Judge Cameron to *Per Curiam* Reversal of Dec. 30, 1960, pages 67, 68 of Appendix A.

If one of the three judges in a case raises such a doubt **on his own motion,** certainly there must exist sufficient question to warrant the granting of the **opportunity** for briefing and argument on the new legal issue by the affected party in interest. This opportunity was not offered. **There was no rehearing** of any type or description afforded to the defendant, either by submission of briefs or oral argument, despite the Court's final sentence in its *per curiam* to the contrary:

"The petition of the appellee for rehearing is granted, **and on rehearing** the judgment of the District Court is Affirmed."

(Emphasis added) *Per Curiam* Decision of Court of Appeals of Dec. 30, 1960, page 66 of Appendix A.

That such procedure is "unusual" needs scant formal authority. Throughout the entire fabric of judicial proceeding is woven the concept of equal opportunity to both sides to be heard in a reasonable time and manner on a material issue of law or fact. Here a new issue of law arose after both sides had been heard. The union urged that this new holding was relevant and controlling, and only requested a hearing. The employer, certain that he would have ample opportunity to give his views, **should the rehearing be granted,** finds, to his dismay, that the decision is made without a hearing, either written or oral. Such proceeding is clearly inapposite to a description of what is "usual" in the area of rehearings, as set out in the exhaustively documented article on this subject appearing in 25 Federal Rules Decisions 143, entitled, "Rehearing in American Appellate Courts:"

"Superficially viewed, rehearing is a simple procedural device for correction of appellate errors. Usually court rules make relatively clear the general procedure contemplated. A decision unsatisfactory to one of the parties has been rendered. He petitions to have the cause set down for reargument, assigning briefly his grounds. There may or may not be oral argument on the petition, new briefs, and answer to the petition. **If the court concludes that the petition should be granted, the case is set for reargument and treated substantially as though it had not been heard before.**"

" * * * **If after reargument** the court concludes that its original decision is erroneous, it revokes

that decision and substitutes what it now deems appropriate."

(Emphasis added) Rehearing in American Appellate Courts, 25 F.R.D, 143, by David Louisell,[45] and Ronan E. Degnon.[46]

Subsequently in this article, after setting down the hurdles which the petitioner for rehearing must overcome to have his petition granted, the authors repeat:

"When the petition has survived the conference and is granted, it is **normally set down for argument and heard as though no prior argument has been had.**"

25 F.R.D. 158 and 159.

A footnote to the above sentence clarifies what was intended in the qualifying word "normally" used above by explaining:

"'Rehear' may be a misnomer; some cases are resubmitted on briefs only."

This case was not resubmitted on either briefs or argument. It was decided on the petition for rehearing alone.

The Cyclopedia of Federal Procedure, Third Edition, confirms the authors above, as to the usual and accepted judicial treatment of rehearings that may be expected by counsel:

"The court will ordinarily pass upon a petition for rehearing with dispatch, and will make an order granting or denying the petition. **In the event the petition is granted, the court will indicate the precise question or questions desired to**

[45] Professor of Law, University of California School of Law; Visiting Professor of Law, Yale University, 1959-60.
[46] Professor of Law, University of Utah.

be reargued, and the cause will be set down for reargument on a day certain affording counsel ample time to be present."

(Emphasis added) 14 Cyclopedia of Federal Procedure, Third Edition, at page 533, 534, Section 68.141.

In addition to this unusual departure from the accepted judicial practice as to rehearings, the appellate court, by its lack of treatment of the remaining issues in the case, other than jurisdiction, appeared to have overlooked them. The silence of the Court was particularly confusing as the very decision upon which the Court of Appeals rested its reversal of itself, *Enterprise Wheel*, also supported the view that federal courts could not enforce arbitrators' awards that were clearly unfaithful to the agreement under consideration. Thus, this same holding was newly controlling on one of the basic issues and defenses raised by the employer. This guidance from the Supreme Court on the role of federal courts in enforcing labor arbitration decisions was given more prominence in the *Enterprise Wheel* opinion than was the issue of jurisdiction, which received only offhand and superficial treatment. Yet, despite the fact that the employer called this to the attention of the Court in its own petition for rehearing, the Court still gave no indication that it was aware of any issue in the case beyond jurisdiction. The employer's petition to grant a rehearing in the light of the new jurisprudence on the remaining issues that had been briefed, argued **and by-passed eight months before and by-passed again in the per curiam reversal,** was denied without comment, but with one dissenting vote.

In summary on this point, petitioners submit that review should be granted to correct the departure of the

Court of Appeals in this instance from the usual and accepted course of judicial proceedings as to rehearings, and to correct the impression given by the lack of written opinion that the Court has, either through oversight, failed to consider the issues presented in the case, or has erroneously and silently sanctioned departures from Rule 56 of the Federal Rules of Civil Procedure and controlling case law on labor arbitration.

VII.
CONCLUSION

In conclusion, petitioners submit that on the labor law aspects of this case, review should be granted to resolve existing conflict and doubt as to federal jurisdiction under Section 301 of the Labor Management Relations Act, to delineate standards of impartiality and disinterest required of labor arbitrators whose awards may be subject to federal enforcement, and to clarify and emphasize the limitations on federally enforceable arbitration awards that revise the agreement interpreted.

Further, petitioners urge that review should be granted to correct appellate error that conflicts with Rule 56 of the Federal Rules of Civil Procedure and the departure from the usual and accepted judicial practice on both rehearings and the customary disposal of issues presented in a case by written opinion.

For the foregoing reasons, it is respectfully suggested that a writ of certiorari be granted and that the decision of the Court of Appeals should be remanded with instruction to grant a rehearing to the parties and dispose of the issues raised in the case beyond jurisdiction by written opinion.

In the alternative, that on review, the decision of the Court of Appeals should be reversed and the case re-

manded with instructions to dismiss the action of the union for lack of jurisdiction. In the alternative, if this Honorable Court should hold on review that there is jursidiction, that the Court of Appeals be reversed and the case remanded with instructions to dismiss on the grounds that the processes of the "Committee" in this case are not enforceable as an "arbitration" award. In the alternative, if this Honorable Court should hold that the award of the "Committee" is an arbitration award, that the Court of Appeals be reversed and the case be remanded with instructions to dismiss on the ground that the award is unenforceably violative of the express provisions of the bargaining agreement and on the further ground that the Court of Appeals sanctioned a departure by the Trial Court from Rule 56 of the Federal Rules of Civil Procedure in that the latter court granted summary judgment while in error as to material facts in the case.

Respectfully submitted,

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BALDWIN, HASPEL, MOLONY,
RAINOLD and MEYER,
Attorneys for Petitioner,
1108 Richards Building,
New Orleans 12, Louisiana,

Of Counsel:
LAWRENCE J. MOLONY

CERTIFICATE

This certifies that copies of this petition have been served on counsel for respondent, Local 130 of the International Brotherhood of Electrical Workers, AFL-CIO, by delivery in person on this day of March, 1961.

CONRAD MEYER, III

APPENDIX A

Decisions of United States Circuit Court of Appeals and the District Court in this Case

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WRIGHT, District Judge:

The Union seeks enforcement of an arbitration award covering unpaid wages payable to certain of defendants' employees. The defendant employer has moved to dismiss on the ground that the Union cannot sue to recover unpaid wages allegedly due employees under the collective bargaining agreement, that the grievance procedure outlined in that agreement does not amount to arbitration, and that, in any event, there is no authority in the agreement for a money award. The plaintiff has moved for summary judgment on the ground that since there is no controverted issue of fact, it is entitled to judgment as a matter of law.

Mississippi Valley Electric Company is a member of the South Louisiana Chapter of the National Electrical Contractors Association. This association, as a representative of Mississippi Valley and other independent electrical contractors, entered into a collective bargaining agreement with Local 130 on July 1, 1957. This contract lists certain job classifications and sets minimum wage rates for those jobs. It also contains a no strike clause[1] as well as a provision for the adjustment of disputes

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[1] Article 1, Section 4 of the collective bargaining agreement reads:
"Section 4. There shall be no stoppage of work either by strike of lockout because of any proposed changes in this agreement or disputes over matters relating to this agreement. All such matters must be handled as stated herein."

through arbitration machinery set up therein.[2]

The arbitration machinery operates in three stages, in any of which a dispute may be settled. The first stage consists of a meeting of the disputants' representatives, the local union's business manager and the association's chapter manager, with the contractor himself sitting in on the discussion if he wishes. If no resolution of the conflict is found in the first stage, the dispute is referred to a Joint Labor Management Committee of ten members, five representing the employer and five the union. Should this committee fail to agree or to adjust the dispute, the matter is then referred to the Council on Industrial Relations for the Electrical Industry for the United States and Canada, the decision of the Council being "binding and final on both parties."

On June 24, 1958 the Union filed with the Association a formal protest against the work practices of the

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[2] The relevant provisions of the agreement read:

"Section 5. There shall be a Joint Management Committee of five (5) representing the Employer and five (5) representing the Union. It shall meet regularly at such stated times as it may decide. However, it shall also meet within 48 hours when notice is given by either party. It shall select its own Chairman and Secretary.

"Section 6. All grievances or questions in dispute shall be adjusted by the duly selected representatives of both parties to this agreement. In the event that these two are unable to adjust any matter within 48 hours, they shall refer same to the Joint Labor Management Committee.

"Section 7. All matters coming before the Committee shall be decided by a majority vote. Six (6) members of the committee, three (3) from each of the parties hereto, shall be a quorum for the transaction of business, but each party shall have the right to cast the full vote of its membership and it shall be counted as though all were present and voting.

"Section 8. Should this Committee fail to agree or to adjust any matter, such shall then be referred to the Council on Industrial Relations for the Electrical Industry for the United States and Canada. The decision of the Council shall be binding and final on both parties hereto.

"Section 9. When any matter in dispute has been referred to the Joint Labor Management Committee or the Council on Indrstrial Relations for the Electrical Industry for the United States and Canada, for adjustment, the provisions and conditions prevailing prior to the time such matter arose shall not be changed or abrogated, pending a decision in such conciliation or arbitration."

defendant, Mississippi Valley, and asked for a meeting between union and chapter representatives so that the dispute could be adjusted. The Union charged that while performing a contract for the Dock Board of New Orleans, Mississippi Valley assigned certain work to be done in the shop at the local shop pay rate when such work should have been performed on the job site at the higher line journeyman's wage rate. The Union also charged that on the same job Mississippi Valley sublet part of its contractual obligation to contractors who were not bound by union wage rates.

When the first stage of arbitration procedure failed to resolve the differences between the parties, the matter was referred to the Joint Committee. On January 21, 1959 the Committee found Mississippi Valley "guilty on all charges" and announced the following award: "The penalty shall be that Mississippi Valley Electric shall pay the men who performed work in the shop at shop rate of pay on the Line job in question, $353.00 prorated among the men who performed said work, in the shop. This is the Committee's estimate of difference of wages due the men." The Union has brought this action in this Court to enforce this award, and the threshold consideration is whether this Court has jurisdiction so to do under Sec. 301 of the Taft Hartley Act. 29 U.S.C. Sec. 185.

In *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 348 U.S. 437, the Supreme Court held that Sec. 301 does not authorize a suit by a union seeking a judgment for unpaid wages owed individual employees under the collective bargaining agreement. It is this case, of course, on which the defendant employer relies. Two years after this decision was rendered, however, the Supreme Court, in deciding *Textile Workers Union of America v. Lincoln Mills of*

Alabama, 353 U.S. 448, and two companion cases,[3] beat a retreat from Westinghouse. In Lincoln Mills the Court required the employer to submit to arbitration, as provided in the collective bargaining agreement; in a dispute between the parties as to work loads and work assignments of the employees. The Court in Lincoln Mills said that the federal court must fashion its own body of law in interpreting Sec. 301 with respect to the responsibilities of the parties to a collective bargaining agreement.

Left unanswered in Lincoln Mills was whether specific performance of an award made by an arbitration group, formed pursuant to a collective bargaining agreement, can be enforced by a federal court under Sec. 301. This question has been answered in the affirmative by the Sixth Circuit in *A. L. Kornman Co. v. Amalgamated Clothing Workers*, 264 F. 2d 733, and by the Fourth Circuit in *Textile Workers Union of America v. Cone Mills Corporation*, June 16, 1959, and *Enterprise Wheel and Car Corporation v. United Steelworkers of America*, June 16, 1959. These cases also answered the further question as to whether the district courts had jurisdiction to enforce the arbitration clause of a labor contract if the employees themselves may be the ultimate beneficiaries of the award. Again the answer was in the affirmative. In *Kornman supra*, the Court enforced an arbitration award of vacation pay to employees. In *Cone, supra*, the Court enforced an arbitration award involving unemployment benefits to employees. And in *Enterprise Wheel and Car Corporation v. United Steelworkers of America, supra*, the Court enforced an award covering reinstatement of employees with payment of back wages.

The defendant employer cites *Refinery Employees Union of the Lake Charles Area v. Continental Oil Com-*

[3] *General Electric Co. v. Local 205*, 353 U.S. 547; *Goodall-Sanford Inc. v. United Textile Workers of America*, 353 U.S. 550.

pany,[4] 5 Cir., June 25, 1959, as the one case which has resisted the retreat from Westinghouse. The dispute there related to the right of certain employees to make overtime pay. The arbitrators decided that the employer had breached the bargaining agreement by favoring certain employees with overtime work, thus denying the overtime to employees entitled thereto under the contract. The award provided that the employer must pay the overtime as damages even though the work had actually been performed by other employees who were paid therefor.

The Fifth Circuit read the arbitration provisions of the bargaining agreement narrowly. It held that while the parties could be required to arbitrate, no money award could be made since there was no specific provision therefor in the bargaining agreement. It pointed out that the arbitration clause in the bargaining agreement was severely limited as to the subject matter for arbitration. It also held that, since under the bargaining agreement the Union retained the right to strike, there was no *quid pro quo* for a broad grant of authority to arbitrate disputes.

The bargaining agreement of the parties here contains a no strike clause. Moreover, its arbitration provision covers "all grievances or questions in dispute." These provisions in the bargaining agreement distinguish this case from *Refinery Employees Union of the Lake Charles Area v. Continental Oil Company, supra*, decided by the Fifth Circuit, and bring it within the ambit of the *Korman* case from the Sixth Circuit and the *Cone Mills Corporation* and *Enterprise Wheel & Car Corporation* cases from the Fourth Circuit.

The defendant also argues that no genuine arbitra-

[4] Compare *United Steelworkers of America v. Warrior & Gulf Navigation Company*, 5 Cir., July 30, 1959.

tion machinery is set up in the bargaining agreement and thus Lincoln Mills and its progeny are irrelevant. It is true that the arbitration provisions do not follow the classic formulation of the United States Arbitration Act.[5] But the United States Arbitration Act specifically does not apply to labor disputes. 9 U.S.C. Sec. 1. The arbitration machinery set up in the contract is what the parties agreed to, presumably because it was best suited for the purpose intended. It is a comprehensive, fair, and final method for settlement of disputes, binding on both parties.

Motion of defendant to dismiss denied. Motion of plaintiff for summary judgment granted.

UNITED STATES DISTRICT JUDGE

New Orleans, Louisiana
August 5, 1959

175 F. Supp. 312

(May 10, 1960.)

Before CAMERON, JONES and BROWN, Circuit Judges.

CAMERON, Circuit Judge: The narrow question upon which this appeal will be decided is whether under § 301 of the Taft-Hartley Act, 29 U.S.C.A. § 185, the court below had jurisdiction of an action brought by the union to recover wages allegedly due individual employees, figured at the rates and under the terms of the Collective Bargaining Agreement between the union and the

[5] 9 U.S.C. § 1-14.

employer. The union, appellee, sued the Electric Company, appellant, to collect wages in the sum of $353.00 found by the Joint Labor Management Committee to be due to certain of appellant's employees. Appellant moved to dismiss upon the ground, among others, that the court below did not have jurisdiction of such a suit by the union. Said court denied this motion and granted summary judgment in favor of the appellee union for the amount shown by the affidavits to be due under the award to individual employees, said judgment ordering that the appellant pay to the union the sum awarded "so that said award may be implemented by the plaintiff [union]."

The facts are more fully set forth in the written opinion of the court below.[1] Its reasoning is epitomized in this language: "In *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 348 U.S. 437, 75, S. Ct. 489, 99 L. Ed. 510, the Supreme Court held that § 301 does not authorize a suit by a union seeking a judgment for unpaid wages owed individual employees under the collective bargaining agreement. * * * Two years after this decision was rendered, however, the Supreme Court, in deciding *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 77 S. Ct. 912, 923, 1 L. Ed. 2d 972, and two companion cases, beat a retreat from Westinghouse. * * * *"*

"Left unanswered in Lincoln Mills was whether specific performance of an award made by an arbitration group, formed pursuant to a collective bargaining agreement, can be enforced by a federal court under § 301. * * * *"*

We are unable to agree that, as applied to the facts before us, the Supreme Court has "beat a retreat from

[1] 175 F. Supp. 312 (1959).

Westinghouse;" and are of the opinion that the *Westinghouse* decision is controlling on us in the decision of this case. *Westinghouse* involved a civil action brought by the union against the Westinghouse Corporation to recover upwards of $45,000.00 alleged to be due four thousand employees represented by plaintiff, as wages for April 3, 1951, under the allegation that the wages were due by reason of the collective bargaining contract between the union and Westinghouse.[2]

The Westinghouse Corporation defended on the contention "that the court does not have jurisdiction because these claims arise from 'the individual employment contract rather than from the Collective Bargaining Contract' and that § 301(a) of the Taft-Hartley Law gives jurisdiction to a federal court only in the event that the contract in suit was entered into between the employer and the labor organization as distinguished from an individual contract of hiring entered into between the employer and the individual employee."[3] The district court rejected that contention:

> "In the opinion of the court, this contention fails because the complaint under consideration is based exclusively upon the Collective Bargaining Contract between the association and the corporation and not upon the contracts of hiring between the corporation and the individual employees."

Based upon its conclusion that the complaints did not show affirmatively the specific causes of the absences of the employees on April 3rd, the district court dismissed the complaint. The union appealed to the Court of Appeals for the Third Circuit, which gave detailed consider-

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[2] The amended complaint prayed in behalf of the union and "the individuals in interest whom it represents" a declaratory judgment as to the meaning of the provisions of the contract under which the action was brought and repeated the demand for the money judgment.

[3] 1952, 107 F. Supp. 692, 694.

ation to the question now before us and vacated the district court's order and dismissed the complaint for lack of jurisdiction.[4]

The Supreme Court affirmed the action of the Court of Appeals in an exhaustive opinion[5] which, with the dissents, covers thirty pages of the official reports. The opinion of the court (concurred in by three Justices) includes a historical study of labor legislation and an analysis of the language of the statute supplemented by the congressional history and announces this conclusion:

> "Considering the nature of a collective bargaining contract, which involves the correlative rights of employer, employee *and* union, we might be disposed to read § 301 as allowing the union to sue in this case. With due regard to the constitutional difficulties which would be raised, and in view of the fact that such an interpretation would bring to the federal courts an extensive range of litigation heretofore entertained by the States, we conclude that Congress did not will this result. There was no suggestion that Congress, at a time when its attention was directed to congestion in the federal courts, particularly in the heavy industrial areas, intended to open the doors of the federal courts to a potential flood of grievances based upon an employer's failure to comply with terms of a collective agreement relating to compensation, terms peculiar in the individual benefit which is their subject matter and which, when violated, give a cause of action to the individual employee. The employees have always been able to enforce their individual rights in the state courts. * * * "
>
> "Nowhere in the legislative history did Congress discuss or show any recognition of the type of suit involved here, in which the union is suing

[4] 1953, 210 F. 2d 623.
[5] 348 U.S. 437.

> on behalf of employees for accrued wages. Therefore, we conclude that Congress did not confer on the federal courts jurisdiction over a suit such as this one." (348 U.S. 459-460.)

Two additional Justices, concurring in the result, stated: "For us the language of § 301 is not sufficiently explicit nor its legislative history sufficiently clear to indicate that Congress intended to authorize a union to enforce in a federal court the uniquely personal right of an employee for whom it had bargained to receive compensation for services rendered his employer, * * * "

One other Justice, specifically concurring, stated his reasons thus: "The reason, I think, that this union cannot recover from the employer in this suit under § 301 is that the claim for wages for the employees arises from separate hiring contracts between the employer and each employee. The union does not undertake to do work for the employer or even to furnish workers. The duty, if any there be, to pay wages to an employee arises from the individual contract between the employer and employee, not from the collective bargaining agreement. Therefore there is set out no violation of a contract between an employer and a labor organization as is required to confer jurisdiction under § 301. The facts show an alleged violation of a contract between an employer and an employee—a situation that is not covered by the statute."

All of the contentions here made,[6] therefore, were

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[6] The complaint upon which the court below entered the judgment before us sets forth certain terms of a collective bargaining agreement entered into between the appellee union and the chapter of the National Electric Contractors Association which was acting for and on behalf of the appellant Mississippi Valley. The complaint further avers that the union notified the appellant by letter of certain respects in which it had violated sections of the contract, quotes the provisions of the contract governing settlement of grievances or disputes between the parties, charges that the machinery provided in the contract has resulted

Continued

given full consideration by the Court of Appeals and by the Supreme Court in *Westinghouse* and the conclusion reached by both was that a suit by the union to collect wages claimed to be due employees was not maintainable under the Taft-Hartley Act. The facts of this case bring it squarely under *Westinghouse* not within the ambit of *Lincoln Mills* and, as applied to the case before us, we cannot agree with the conclusion of the court below that the Supreme Court "beat a retreat from Westinghouse" in the *Lincoln Mills* case.[7] As far as their holdings relate to the facts of our own case, at least, we find no conflict between *Westinghouse* and *Lincoln Mills*.

The language of footnote 6 of the *Lincoln Mills* decision, 353 U.S. p. 456, indicates clearly that it was the Court's intention to adhere to its decision in *Westinghouse* in suits involving only recovery of wages claimed to be due individual employees:

> "*Assn. of Westinghouse Employees v. Westinghouse Elec. Corp.*, 348 U.S. 347, is quite a different case. There the union sued to recover unpaid wages on behalf of some 4,000 employees. The basic question concerned the standing of the union to sue and recover on those individual employment contracts. The question here concerns the right of

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[6] Continued

in an award by the Joint Labor Management Committee, which provided in part that Mississippi Valley "should pay certain of Mississippi Valley's $350.00 because Mississippi Valley had failed to pay the scale of wages to those employees as provided for in the agreement," and concludes with these averments and prayer for relief:

> "12. A part of the award of the Joint Labor Management Committee was that defendant should pay certain of defendant's employees $350.000 because defendant had failed to pay the scale of wages to those employees as provided for in the agreement.
>
> "13. Despite repeated demands made on the defendant by plaintiff, defendant refused and does still refuse to abide by the award of the Joint Labor Management Committee.
>
> "WHEREFORE, plaintiff demands judgment against defendant in the sum of Three Hundred Fifty ($350.00) Dollars, interest and costs."

[7] 353 U.S. 448, 77 S. Ct. 912, 923, 1 L. Ed. 972.

the union to enforce the agreement to arbitrate which it has made with the employer."

The opinion of two of the Justices concurring in the result reached in the *Lincoln Mills*-decision supports the same thesis.[8] Examination of the *Lincoln Mills* case as it was dealt with by the Court of Appeals shows that both the majority[9] and dissenting opinions considered the problem before the court to be a "genuine union controversy." And the essential thrust of the opinion of the Supreme Court together with the concurrence and the dissent show the same thing.[10]

The court below conceded that *Lincoln Mills* did not decide the question before it, but felt that the question had been answered by three Circuit Court cases.[11] While these cases have a tendency, upon superficial examination, to support the action of the court below, each f them had its genesis in the effort to enforce a right claimed by the union itself as against the employer.

The case before us presents no such complications. Here, the union sues to recover a specific amount claimed

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[8] 353 U.S. at p. 460: "The District Court had jurisdiction over the action since it involved an obligation running to a union—a union controversy—and not uniquely personal rights of employees sought to be enforced by a union. Cf. *Association of Westinghouse Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437. * * * The power to decree specific performance of a collectively bargained agreement to arbitrate finds its source in § 801 itself, and in a Federal District Court's inherent equitable powers, nurtured by a congressional policy to encourage and enforce labor arbitration in industries affecting commerce."

[9] *Lincoln Mills of Alabama v. Textile Workers Union Etc.*, 1956, 230 F. 2d 81, and dissenting opinion, ib. pp. 89, 95.

[10] It is clear, also, that the other two Supreme Court cases cited by the court below, *General Electric Co. v. Local 205 Etc.*, 1957, 353 U.S. 547, and *Goodall-Sanford, Inc. v. United Textile Workers of America*, 1957, 353 U.S. 550, involved controversies between the union and the employer concerning peculiarly union rights in collective bargaining agreements, and did not involve a mere attempt by the union to collect wages alleged to be due to the individual employees.

[11] *A. L. Kornman Co. v. Amalgamated Clothing Workers Etc.*, 6 Cir., 1959, 263 F. 2d 733; *Textile Workers Union of America v. Cone Bros. Corporation*, 4 Cir., 1959, 268 F. 2d 920; and *Enterprise Wheel & Car Corporation v. United Steelworkers of America*, 4 Cir., 1959, 269 F. 2d 327.

to be due individual employees. The action seeks nothing but a money judgment. Nothing in the record tends to show that the union had been commissioned by the unnamed individual employees to prosecute the action as their representative. Nothing in the law or the rules of procedure vests the union with any such authority. The obligation sought to be enforced here would come into being only if the employees performed specified duties. The rate of pay was fixed by the union contract, but the obligation to pay grew solely out of individual contracts with individual employees. If the union should be held to have the right to maintain this action, each employee is purported to represent would be bound by the result it obtained. There is nothing in the record to indicate that the employees had constituted the union their agent to file such an action.

Both the language of § 301 and the holding of *Westinghouse* categorically reject the right of the union to do what it seeks to do here.[12] We hold that the court below erroneously awarded summary judgment in favor of the appellee. Instead, it ought, in our opinion to have granted appellant's motion to dismiss. For the entry of such an order the judgment of the court below is reversed and the case is remanded.

REVERSED AND REMANDED.

JONES, Circuit Judge, concurring specially:

With the conclusion stated in the opinion written for the Court I am in agreement. I think the three cases cited in footnote 11 of that opinion are contrary to the

[12] And cf. *Item Company v. New Orleans Newspaper Guild*, 5 Cir., 1958, 256 F. 2d 855, and *Refinery Employees Union of the Lake Charles Area v. Continental Oil Co.*, 5 Cir., 1959, 268 F. 2d 447, certiorari denied 361 U.S. 896.

conclusion there expressed and are in accord with the views of the district court in this case. I think the Westinghouse rule requires a reversal of the decision before us for review. I share the view that Lincoln Mills does not govern this case, but that we are bound by Westinghouse. Therefore I would depart from the doctrines of the Fourth and Sixth Circuits and join in the reversal of the judgment of the district court.

BROWN, Circuit Judge, dissenting:

I respectfully dissent.

Despite its initial appearance and this Court's treatment, with which I cannot agree, this is not a suit by the Union to recover a debt owed to individual employees. Rather—viewed as it must be from the scope of a complaint under F. R. Civ. P. 8(a), 12(b)(6), 54(c) and *Conley v. Gibson*, 1957, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 80—it is an action for specific performance of a unanimous arbitration award determined pursuant to the provisions of the collective bargaining agreement between the Union and Employer.

The collective bargaining agreement set up the arbitration scheme. In exchange for a no-strike (and no-lockout) clause, all disputes over matters relating to the collective agreement were to be adjusted through the arbitration process provided for in the contract. Initially, any dispute is to be handled by two designated representatives of the parties. If they fail to resolve the controversy, the matter is referred to a joint Labor Management Committee consisting of five union and five employer representatives. Should this Committee fail to agree or to adjust any matter, the disptue is then referred

to the Council on Industrial Relations for the Electrical Industry for the United States and Canada, whose decision is "binding and final on both parties."* Here the Joint Labor Management Committee undertook to decide and did decide the controversy. The only difficulty as far as the Employer is concerned is that the Committee decided against it. Thus here what superficially appears as merely an assertion by the Union for direct relief, i.e., back wages, for individual employees in fact is an effort to require the Employer to abide by the arbitrator's award pursuant to an agreement to arbitrate which the District Court would have been empowered specifically to enforce had the Employer declined to allow consideration of the dispute by the Joint Labor Management Committee. *Textile Workers Union v. Lincoln Mills*, 1957, 353 U.S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972.

This is, on all tests, a *union* controversy in which the Union is asserting in its collective capacity a demand that the Employer abide by its contractual obligation to comply with resulting decisions or awards of the arbitration process. It is not an effort by the Union to enforce "uniquely personal rights" of individual employees. The only novel or surprising thing is that, at this late date,

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* The pertinent provisions of the agreement read as follows:

"Section 4. There shall be no stoppage of work either by strike or lockout because of any * * * disputes over matters relating to this agreement. All such matters must be handled as stated herein.

"Section 5. There shall be a Joint Labor Management Committee of five (5) representing the Employer and five (5) representing the Union. * * *

"Section 6. All grievances or questions in dispute shall be adjusted by the duly selected representatives of both parties to this agreement. In the event that the two are unable to adjust any matter within 48 hours, they shall refer same to the Joint Labor Management Committee.

"Section 8. Should this Committee fail to agree or to adjust any matter, such shall then be referred to the Council on Industrial Relations for the Electrical Industry for the United States and Canada. The decision of the Council shall be binding and final on both parties hereto."

there should be any doubt that the District Court has jurisdiction under § 301 of the Taft Hartley Act, 29 USCA § 185, to enforce an arbitration award resulting from an agreement to arbitrate which the District Court would have been empowered specifically to have enforced. *Textile Workers Union v. Lincoln Mills*, 1957, 53 U.S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972.

Association of Westinghouse Salary Employees v. Westinghouse Electric Corp., 1955, 348 U.S. 437, 75 S. Ct. 488, 99 L. Ed. 510, is no obstacle. There the Supreme Court in a 3-2-1-2 split held that § 301 does not of itself authorize a union to bring a direct action (apart from any arbitration machinery) to recover back wages for individual employees. As Chief Justice Warren (with Justice Clark concurring) stated (the *holding*,[b] " • • • § 301 is not sufficiently clear to indicate that Congress intended to authorize a union to enforce in a federal court the uniquely personal right of an employee for whom it had bargained to receive compensation for services rendered his employer." 348 U.S. 437 at 461, 75 S. Ct. 488, 99 L. Ed. 510 at 525. But the rationale of Mr. Justice Frankfurter—rigorously confining § 301 to a procedural[c]

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[b] See the opinion of the Court by Mr. Justice Frankfurter (Justices Burton and Minton concurring) in which he stated substantially the same thing. There is no indication that Congress "intended to open the doors of the federal courts to a potential flood of grievances based upon an employer's failure to comply with terms of the collective agreement relating to compensation terms peculiar in the individual benefit which is their subject matter in which, when violated, give a cause of action to the individual employee." 348 U.S. 437, 460, 75 S. Ct. 488, 99 L. Ed. 510, 525.

Justice Reed agreed that it was not a proper case under § 301 because it was not based upon the violation of a "collective bargaining agreement based on the failure of either the employer or the union to carry out its undertakings with the other." 348 U.S. 437, 462, 75 S. Ct. 488, 99 L. Ed. 510, 525.

Justices Douglas and Black dissented on the ground that this was part of the essential collective bargaining relationship and the union should have standing to sue.

[c] Section 301 gives procedural directions to the federal court to overcome hampering rules governing unincorporated associations.

concept to avoid "serious constitutional problems"[d]—in reaching the generally agreed upon result, was clearly rejected in *Lincoln Mills* as his lone dissent indicates. The Supreme Court[e] in *Lincoln Mills* held that § 301 "* * * does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreement [to arbitrate grievance disputes] on behalf of or against labor organizations. * * * The question then is, what is the substantive law to be applied in suits under § 301(a)? We conclude that the substantive law to apply under § 301(a) is federal law which the courts must fashion from the policy of our national labor laws." 353 U.S. 448, 455-456, 77 S. Ct. 912, 1 L. Ed. 2d 972, 979-980. Yet it is this apprehension of constitutional and court administrative problems which occupies the principal attention of Judge CAMERON'S opinion.[f] We need not determine whether the result merits the language characteristic of the colorful opinions of Judge Wright—that the Court "beat a retreat from Westinghouse."[g] In a figure indigenous to warfare—military or industrial—if the Court did not beat a retreat, at least the army changed. He who

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[d] Justice Frankfurter foresaw grave constitutional problems if § 301 is considered as "a grant of jurisdiction to federal courts over a contract governed entirely by state substantive law, a jurisdiction not based on diversity of citizenship yet one in which a federal court would, as in diversity cases, administer the law of the State in which it sits."

[e] The sharp divergence of views between the Court and Mr. Justice Frankfurter is illustrated by the following quotation from Justice Frankfurter's dissent in *Lincoln Mills*.

> "The Court has avoided the difficult problems raised by § 301 * * * by attributing to the section an occult content. This plainly procedural section is transmuted into a mandate to the federal courts to fashion a whole body of substantive federal law * * *. § 301 cannot be so construed * * *." 353 U.S. 448, 460-461, 1 L. Ed. 2d 972, 983.
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> "* * * I am impelled to the view that [§ 301] is unconstitutional in cases such as the present ones where it provides the sole basis for exercise of jurisdiction by the federal courts." 353 U.S. at 484, 1 L. Ed. 2d 996.

[f] See the extensive quotation from Mr. Justice Frankfurter's three justice opinion for the Court taken from 348 U.S. 459-460.

[g] 175 F. Supp. 312, 314.

was its spokesman with a small band of two others, finds himself now all alone. Moreso, the cause he so earnestly championed—constitutional and administrative limitations—was abandoned by former allies. And where once stood forces divided by 3-2-1-2 all but one were now united that it was a matter within the constitutional power of the federal government and that it posed no administrative problems insuperable to the judicial machinery. And this, though at the bottom of the case was merely an aggregation of grievances personal to specific workers concerning "work loads and work assignments." 353 U.S. 448, 449, 77 S. Ct. 912, 1 L. Ed. 2d 972, 976.[h]

Since the District Court has jurisdiction under § 301 to enforce an agreement to arbitrate—an obligation running to a union and not a uniquely personal right of the employee—it must necessarily have jurisdiction to enforce the resulting award. To hold otherwise would reduce arbitration to an empty shell in which the agreement to arbitrate, which could be specifically enforced under § 301, is merely a futile and time-consuming preclude to a meaningful determination which must now come through other means. The tenor—if not command—of *Lincoln Mills* is to the contrary. As the agreement to arbitrate grievance dispute is the *quid pro quo* for an agreement not to strike, § 301 " * * * expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way." *Lincoln Mills, supra*, 353 U.S. 448, 455, 77 S. Ct. 912, 1 L. Ed. 2d 972, 979. The obligation to comply with the award runs to the union—and is therefore a union controversy—though the subject

[h] See also our cases of *Lodge No. 12, International Ass'n Machinists v. Cameron Iron Works*, 1958, 257 F. 2d 467; *Item Co. v. New Orleans Newspaper Guild*, 1958, 256 F. 2d 855. In each we rejected the idea that since the arbitration being sought would result in decisions affecting individual workers' rights to pay, etc., it was not a "union suit."

matter in dispute may or may not be primarily personal to employees, see note *h*, *supra*.

We stand in conflict with both the Fourth and the Sixth Circuits. For me, I cannot brush them off so lightly as does the majority (see note 11 and appended text). In cases in which the issue has been directly posed both have held that § 301 authorized a federal court to enforce an award arrived at through the arbitration process. In *A. L. Korman Co. v. Amalgamated Clothing Workers*, 6 Cir., 1959, 264 F. 2d 733, the Court enforced an arbitration award of vacation pay to the employees. To the same effect are the two cases from the Fourth Circuit, *Textile Workers Union v. Cone Bros. Corp.*, 4 Cir., 1959, 268 F. 2d 920, involved a suit by the union for specific performance of an arbitration award of unemployment benefits of employees. In *Enterprise Wheel & Car Corp. v. United Steel Workers*, 4 Cir., 1959, 269 F. 2d 327, the Court decreed specific performance of an award to the union for lost wages of discharged employees.

Employer and Union agreed in their wisdom to forego work stoppages—whether by strike or lockout—and submit disputes to the arbitration machinery which they set up. A dispute has been submitted and resolved in the form of an award to the Union.

The Union agreed to arbitrate. The Employer agreed to arbitrate. Congress, by § 301, sought to create effective sanctions to compel parties to industrial disputes to live up to their contracts. The contract with the Union was that the Employer would arbitrate and the arbitration awards would be complied with. It is that agreement which the Employer has breached.

The Employer's breach presented a union suit and

the District Court properly enforced the award. 175 F. Supp. 315.

I therefore dissent.

278 F. 2d 764

(December 30, 1960.)

ON PETITION FOR REHEARING.

Before CAMERON, JONES and BROWN, Circuit Judges.

PER CURIAM: Since our opinion[1] was rendered in this case, the Supreme Court has decided *United Steelworkers of America v. Enterprise Wheel and Car Corporation*, 363 U.S. 598, 80 S. Ct. 1358, 4 L. Ed. 2d 1424. The decision of the Supreme Court is contrary to the position taken in the majority opinion of this Court and requires that we recede from our views as previously expressed. See also *United Steelworkers of America v. American Manufacturing Company*, 363 U.S. 564, 80 S. Ct. 1343, 4 L. Ed. 2d 1403; *United Steelworkers of America v. Warrior & Gulf Navigation Company*, 363 U.S. 574, 80 S. Ct. 1347, 4 L. Ed. 2d 1409.

The petition of the appellee for rehearing is granted, and on rehearing the judgment of the district court is

AFFIRMED.

CAMERON, Circuit Judge, Dissenting:

I respectfully dissent from the per curiam opinion granting the petition of the appellee for a rehearing and

[1] 278 F. 2d 764.

affirming the judgment of the district court. I think the majority opinion rendered by this Court[1] was correct in what it decided and the reasoning upon which the decision was based.

I do not think the cases now cited by the majority overrule or modify *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation*, 1955, 348 U.S. 437; and I do think this case is governed by that decision.

The case before us is not, in my opinion, a union controversy rather than uniquely personal rights of employees sought to be enforced by a union. The relief sought is, in my judgment, nothing but a money judgment due, not to the union, but to certain individuals.[2]

There is no prayer for specific performance, and nothing is asked but a money judgment. The appellants did not owe the union any money. As we set out in the majority opinion when the case was originally before us, the union was attemptin, to enforce a demand belonging, not to the union, but to the individuals with whom the appellants had separate contracts to pay the money.

Mr. Justice Burton and Mr. Justice Harlan concurred in the result of *Textile Workers Union v. Lincoln Mills*, 1957, 353 U.S. 448, at 460, using language of import similar to that used by Chief Justice Warren and

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[1] 278 F. 2d 764.

[2] The concluding paragraphs of the complaint read thus:

"12. A part of the award of the Joint Labor Management Committee was that defendant should pay *certain of defendant's employees* $350.00 because defendant had failed to pay the scale of wages to those employees as provided for in the agreement.

"13. Despite repeated demands made on the defendant by plaintiff, defendant refused and does still refuse to abide by the award of the Joint Labor Management Committee.

"WHEREFORE, plaintiff demands judgment against defendant in the sum of Three Hundred Fifty ($350.00) Dollars, interest and costs." [Emphasis supplied.]

Mr. Justice Clark concurring in the *Westinghouse* case, 348 U.S. 437, at 461:

> "The District Court had jurisdiction over the action since it involved an obligation running to a union—a union controversy—and not uniquely personal rights of employees sought to be enforced by a union. Cf. *Association of Westinghouse Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437."

The dissent from our original opinion,[3] did not approve the thought expressed by the court below that the Supreme Court had, in *Lincoln Mills*, "beat a retreat" from *Westinghouse*. Rather, it was disposed to attribute the fundamental clash this Court now finds between the two decisions to the fact that the army itself had changed. Even assuming the dubious thesis that the Supreme Court would, because of a change of personnel, be likely to reject a holding hardly two years old, upon the simple principle that one person may not maintain an action to recover money due another unless invested by statute or contract with the right so to do, I do not find either such a change of faces or any statement or implication that *Westinghouse* has been overruled. I do not think it should be lightly inferred that, in the midst of "the complex and baffling problems of our time,"[4] the highest court in the land would not be straining hard to give stability to the law as written in judicial decisions. I see nothing in any of the cases cited by the majority here which tempts me to any other conclusion.

285 F. 2d 229

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[3] 278 F. 2d at 770.

[4] Words used by Chief Justice Warren as reported in 348 U.S. at page vii.

APPENDIX B

Statutes Involved

"Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizataions, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

29 U.S. Code 185 (Section 301(a) of the Labor Management Relations Act of 1947).

"Rule 56. **Summary Judgment**

(a) **For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. As amended Dec. 27, 1946, effective March 19, 1948.

* * * * *

"(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any ma-

terial fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. As amended Dec. 27, 1946, effective March 19, 1948."

Federal Rules of Civil Procedure, Title 28.

APPENDIX C

Pertinent Sections of Collective Bargaining Agreement

Article I. * * *

"Section 5. There shall be a Joint Labor Management Committee of five (5) representing the Employer and five (5) representing the Union. It shall meet regularly at such stated times as it may decide. However, it shall also meet within 48 hours when notice is given by either party. It shall select its own Chairman and Secretary.

"Section 6. All grievances or questions in dispute shall be adjusted by the duly selected representatives of both parties to this agreement. In the event that these two are unable to adjust any matter within 48 hours, they shall refer same to the Joint Labor Management Committee.

"Section 7. All matters coming before the Committee shall be decided by a majority vote. Six (6) members of the committee, three (3) from each of the parties hereto, shall be a quorum for the transaction of business, but each party shall have the right to case the full vote of its membership and it shall be counted as though all were present and voting.

"Section 8. Should this Committee fail to agree or to adjust any matter, such shall then be referred to the Council on Industrial Relations for the Electrical Industry for the United States and Canada. The decision of the Council shall be binding and final on both parties hereto."

Article I, Agreement Between South Louisiana

Chapter, National Electrical Contractors Association, Association of Independent Electrical Contractors of New Orleans and International Brotherhood of Electrical Workers, Local Union 130, July 1, 1957, at pages 4 and 5. Exhibit I.

APPENDIX D

Judgments of the United States Circuit Court of Appeals and the District Court in this Case

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District Court Judgment

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

(Number and Title Omitted.) (Filed: August 10, 1959)

The motion of the plaintiff for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure, having been presented, and the court being fully advised,

The court finds that the plaintiff is entitled to a summary judgment as a matter of law.

IT IS THEREFORE ordered, adjudged and decreed that the plaintiff's motion for summary judgment be and the same hereby is granted, that the defendant specifically perform the agreement set up in the complaint and conform to the arbitration award rendered thereunder, insofar as it provides "the penalty shall be that Mississippi Valley Electric shall pay the men who performed work in the shop at shop rate of pay on the Line job in question, $353.00 prorated among the men who performed said work, in the shop," and that the defendants pay the sum of $353.00, with interest from date of judicial de-

mand, to plaintiff forthwith, so that said award may be implemented by plaintiff, and that plaintiff recover its costs and charges in this behalf expended and have execution therefor.

Dated this 10th day of August, 1959.

By the Court

/s/ J. Skelly Wright
United States District Judge

Court of Appeals for the Fifth Circuit

JUDGMENT

Extract from the Minutes of May 10, 1960

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellee, Local 130 of the International Brotherhood of Electrical Workers, AFL-CIO, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Jones, Circuit Judge, concurring specially."

"Brown, Circuit Judge, dissenting."

Before CAMERON, JONES and BROWN, Circuit Judges.

JUDGMENT ON REHEARING

It is ordered by the Court that the motion for rehearing filed by appellee in this cause on May 27, 1960 be, and the same is hereby granted;

It is further ordered that the judgment heretofore entered on May 10, 1960, whereby the judgment of the United States District Court for the Eastern District of Louisiana was reversed and remanded be, and the same is hereby, set aside;

On further consideration of this cause, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and it is hereby, affirmed and

It is further ordered and adjudged that the appellants, Mississippi Valley Electric Company, a partnership, and Frank L. Pendergrass and Katie T. Pendergrass Individually, be condemned to pay the costs in this Court.

"Cameron, Circuit Judge, Dissenting."

December 30, 1960.

Issued:

January 27, 1961

ON PETITION FOR REHEARING

Before CAMERON, JONES and BROWN, Circuit Judges.

PER CURIAM:

IT IS ORDERED That the petition for rehearing filed by appellants in the above entitled and numbered cause be, and it is hereby DENIED.

CAMERON, Circuit Judge, dissenting.